A

SHAMSUL KAMAR KARIA

v.

PP

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COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
MOHD ZAWAWI SALLEH JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEAL NO: K-05-465-2010]

C

4 SEPTEMBER 2013

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking - Conviction and sentence - Appeal against - Evidence of chemist - Whether satisfactorily and adequately adduced - Whether*

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s. 399(1) Criminal Procedure Code complied with - Whether chemist report admissible - Whether there was illegality which could not be cured under s. 422 Criminal Procedure Code - Whether general provisions of s. 32 Evidence Act 1950 must yield to specific provisions of s. 399(1) Criminal Procedure Code - Whether evidence sufficient to justify

E

appellant's conviction

EVIDENCE: *Documentary evidence - Chemist report - Dangerous drugs - Trafficking in cannabis - Evidence of chemist - Whether satisfactorily and adequately adduced - Whether s. 399(1) Criminal Procedure Code*

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complied with - Whether chemist report inadmissible - Whether there was illegality which could not be cured under s. 422 Criminal Procedure Code - Whether general provisions of s. 32 Evidence Act 1950 must yield to specific provisions of s. 399(1) Criminal Procedure Code - Whether evidence sufficient to justify appellant's conviction

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The appellant and one Awi Yusof ('Awi') were charged and tried together for trafficking in 4,424 grammes of cannabis, an offence in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The offence was said to have been committed on 23 March 2006 in front of a row of shophouses in Kedah. The

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appellant and Awi were said to have acted in concert in furtherance of a common intention to traffic the drugs. The Judicial Commissioner ('JC') found that a *prima facie* case had been made out against the appellant and accordingly convicted him and sentenced him to the mandatory death penalty. Awi was,

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however, acquitted. Dissatisfied with the said decision, the appellant appealed. The key issue that arose for the court's

adjudication was whether the prosecution had adduced credible and reliable evidence in proving that the plant materials found in a plastic bag ('exh. 16'), which was in the possession of the appellant at the material time, were 'cannabis' within the meaning of s. 2 of the DDA.

Held (allowing appeal; quashing and setting aside conviction and sentence)

Per Azahar Mohamed JCA delivering the judgment of the court:

(1) In any drug trafficking case, the chemist is called as a witness by the prosecution at the trial to prove the chemist's oral testimony that the subject matter of the charge is a 'dangerous drug' as defined in the DDA; in which case the oral evidence of the chemist constitutes the best evidence. The evidence of the chemist as an expert witness must be satisfactorily and adequately adduced. However, this was not done in the instant case. The chemist who had conducted the chemical examination and analysis on the drug exhibits had passed away before the commencement of the trial. As such, the appellant could not give any notice under s. 399(1)(b) of the Criminal Procedure Code ('CPC') to require the attendance of the chemist as a witness at the trial. (paras 6, 7 & 9)

(2) A chemist report signed by the chemist was tendered by the prosecution during the trial marked as exh. P11 for the purpose of proving that the chemist had examined and analysed the suspected plant materials recovered and found them to be cannabis under s. 2. As an evidentiary provision and as an important hearsay exception, the stringent fundamental pre-requisite in s. 399(1) of the CPC, namely a copy of exh. P11, must be served on the appellant not less than ten clear days before the commencement of the trial, must be strictly complied with before it could be ruled as admissible and accepted as conclusive evidence for the prosecution to prove that the drugs exhibits were cannabis within the meaning of s. 2 of the DDA. Herein, as fairly admitted by the Deputy Public Prosecutor ('DPP'), the said condition precedent had not been complied with. Thus, exh. P11 was wrongly admitted by the JC in contravention of s. 399(1) of the CPC and the report in such circumstances was inadmissible despite its admission, even with consent or by

A waiver of the appellant. Therefore, that wrongful admission was an illegality which could not be cured under s. 422 of the CPC. (paras 9 & 10)

(3) The DPP submitted that by virtue of the provisions of B s. 32(1)(i) and (j) of the Evidence Act 1950, exh. P11 could be admitted as substantive evidence to prove that the drug exhibits were cannabis. Section 399 is a special and exclusive provision in the CPC governing the admissibility of reports as evidence of certain persons. Section 32 of the Evidence Act C 1950, on the other hand, is a general provision which deals with statements of persons who cannot be called as witnesses *ie*, when the witness is dead or could not be found. Where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the D general law - *generalibus specialia derogant* (*Chu Beow Hin v. PP*, refd). It is a general rule of evidence that the Evidence Act 1950 cannot override specific provisions of other statutes (*Koh Hor Khoon v. Regina*, refd). Therefore, the admissibility of exh. P11 must be governed by s. 399(1) of the CPC, not according to E s. 32 of the Evidence Act 1950, and that the general provisions of the same provision must necessarily yield to the specific provisions of s. 399(1) of the CPC. (para 12)

(4) With the exclusion of exh. P11, there was no sufficient F evidence to justify the conviction of the appellant on the charge. This was based upon the well-established principle that if there was a doubt as to the necessary ingredient of the offence, the benefit of the doubt must go to the accused. The appellant was thus acquitted and discharged. (para 13)

G ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu dan seorang lagi yang bernama Awi Yusof ('Awi') telah dituduh dan dibicarakan bersama-sama bagi satu kesalahan pengedaran 4,424g kanabis, iaitu kesalahan yang bertentangan H dengan s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Kesalahan tersebut telah dilakukan pada 23 Mac 2006 di hadapan sederet rumah kedai di Kedah. Perayu dan Awi dikatakan telah bertindak secara bersama-sama dalam melanjutkan niat bersama untuk mengedar dadah. Pesuruhjaya Kehakiman ('PK') memutuskan I bahawa satu kes *prima facie* telah dibuktikan terhadap perayu dan telah menyabitkan dan menjatuhkan hukuman mati ke atasnya. Awi, walau bagaimanapun, telah dilepaskan dan dibebaskan. Tidak berpuas

hati dengan keputusan tersebut, perayu merayu. Isu utama yang timbul untuk pemutusan mahkamah adalah sama ada pihak pendakwaan telah mengemukakan keterangan yang boleh dipercayai dalam membuktikan bahawa bahan-bahan yang ditemui di dalam beg plastik ('eks. 16'), yang berada dalam milikan perayu pada masa material, adalah 'kanabis' dalam maksud s. 2 ADB.

Diputuskan (membenarkan rayuan; membatalkan dan mengenepikan sabitan dan hukuman)
Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:

(1) Dalam mana-mana kes pengedaran dadah, ahli kimia akan dipanggil sebagai saksi oleh pihak pendakwaan semasa perbicaraan untuk membuktikan melalui keterangan lisan bahawa hal perkara pertuduhan adalah 'dadah berbahaya' seperti yang ditakrifkan dalam ADB; di mana keterangan secara lisan oleh ahli kimia merupakan keterangan terbaik. Keterangan ahli kimia sebagai saksi pakar harus dikemukakan dengan memuaskan dan secukupnya. Walau bagaimanapun, ia tidak dilakukan dalam kes ini. Ahli kimia yang telah menjalankan pemeriksaan kimia dan analisa ke atas ekshibit dadah tersebut telah meninggal dunia sebelum bermulanya perbicaraan. Dengan itu, perayu tidak boleh mengemukakan apa-apa notis di bawah s. 399(1)(b) Kanun Tatacara Jenayah ('KTJ') untuk menghendaki kehadiran ahli kimia sebagai saksi semasa perbicaraan.

(2) Laporan kimia yang ditandatangani oleh ahli kimia telah dikemukakan oleh pihak pendakwaan semasa perbicaraan sebagai eks. P11 bagi tujuan membuktikan bahawa ahli kimia telah memeriksa dan menganalisa bahan-bahan yang disyaki dan mendapati bahawa ia adalah kanabis di bawah s. 2. Sebagai peruntukan keterangan dan pengecualian dengar cakap yang penting, pra-syarat asas yang ketat dalam s. 399(1) KTJ, iaitu salinan eks. P11, mesti diserahkan tidak kurang daripada sepuluh hari genap sebelum permulaan perbicaraan, harus dipatuhi sebelum ia boleh diperintahkan bahawa ia boleh diterima sebagai keterangan muktamad bagi pihak pendakwaan membuktikan bahawa ekshibit dadah adalah kanabis dalam maksud s. 2 ADB. Timbalan Pendakwa Raya ('TPR') telah mengakui bahawa syarat terdahulu tidak dipatuhi dalam kes ini. Oleh itu, eks. P11 telah disalah terima oleh PK dan telah melanggar s. 399(1) KTJ dan laporan tersebut dalam keadaan sedemikan tidak boleh diterima masuk walaupun telah diterima,

jika pun dengan kebenaran atau pengecualian perayu. Oleh itu, kemasukan salah tersebut adalah satu ketidaksahan yang tidak boleh dipulih di bawah s. 422 KTJ.

(3) Menurut peruntukan s. 32(1)(i) dan (j) Akta Keterangan 1950, TPR telah menghujahkan bahawa eks. P11 boleh diterima masuk sebagai keterangan substantif untuk membuktikan bahawa ekshibit dadah adalah kanabis. Seksyen 399 adalah peruntukan yang khas dan eksklusif dalam KTJ yang mengawal kebolehterimaan laporan sebagai keterangan daripada orang-orang tertentu. Seksyen 32 Akta Keterangan 1950, sebaliknya, adalah peruntukan am yang menangani kenyataan-kenyataan orang-orang yang tidak boleh dipanggil sebagai saksi iaitu apabila saksi telah meninggal dunia ataupun tidak dapat dihubungi. Di mana peruntukan khas disediakan dalam satu statut khas, peruntukan khas itu mengecualikan operasi peruntukan am dalam undang-undang am - *generalibus specialia derogant* (*Chu Beow Hin v. PP*, dirujuk). Ia adalah satu peraturan umum keterangan bahawa Akta Keterangan 1950 tidak boleh mengatasi peruntukan-peruntukan khas daripada statut-statut lain (*Koh Hor Khoon v. Regina*, dirujuk). Oleh itu, kebolehterimaan eks. P11 mesti ditadbir oleh s. 399(1) KTJ, dan bukan menurut s. 32 Akta Keterangan 1950, dan peruntukan-peruntukan am peruntukan yang sama semestinya mengikuti kepada peruntukan-peruntukan khas s. 399(1) KTJ.

(4) Dengan pengecualian eks. P11, tiada keterangan yang mencukupi untuk mewajarkan sabitan perayu atas pertuduhan. Ini adalah berdasarkan prinsip matan bahawa jika terdapat keraguan terhadap intipati yang diperlukan untuk membuktikan kesalahan, manfaat keraguan perlu diberikan kepada tertuduh. Perayu dengan itu dilepaskan dan dibebaskan.

Case(s) referred to:

Chah Siew Kok v. PP [1987] 1 CLJ 386; [1987] CLJ (Rep) 518 HC ***(refd)***
Chong Yik v. PP [1953] 1 LNS 15 HC ***(refd)***
Chu Beow Hin v. PP [1980] 1 LNS 107 ***(refd)***
Koh Hor Khoon v. Regina [1955] 1 LNS 44 HC ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Ooi Lean Chai v. PP [1991] 2 CLJ 1304; [1991] 1 CLJ (Rep) 337 SC ***(refd)***
PP v. Chew Siew Luan [1982] CLJ 354; [1982] CLJ (Rep) 285 FC ***(refd)***
Wong Kok Keong v. Regina [1954] 1 LNS 125 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 3, 395, 396, 397, 399(1)(b), 399A, 400, 401, 402A, 422
Dangerous Drugs Act 1952, ss. 2, 39B(1)(a), (2)
Evidence Act 1950, s. 32(1)(i), (j)
Penal Code, s. 34

Other source(s) referred to:
Janab's Key to Criminal Procedure and Evidence, 2nd edn, pp 798, 799

For the appellant - Hisham Nazir; M/s Hisham Nazir & Co
For the respondent - Tetralina Ahmed Fauzi; DPP

[Appeal from High Court, Alor Setar; Criminal Trial No: 45-33-2006]

Reported by Suhainah Wahiduddin

JUDGMENT

Azahar Mohamed JCA:

[1] Shamsul Kamar bin Karia @ Halim ("appellant") and one Awi bin Yusof ("Awi") were charged and tried together for trafficking in 4,424g of cannabis before the Alor Setar High Court, an offence in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA"), and punishable with mandatory death penalty prescribed under s. 39B(2) of the DDA read with s. 34 of the Penal Code.

[2] The offence was said to have been committed on 23 March 2006 at about 3.30pm in front of a row of shophouses at number 3, Lorong 1, Taman Sutera, Batu 2, Sungai Petani, in the District of Kuala Muda, in the State of Kedah Darul Aman. Both the appellant and Awi were said to act in concert in furtherance of a common intention to traffic the drugs.

[3] At the end of case for the prosecution, the learned Judicial Commissioner ("JC") found that the prosecution had not made out a *prima facie* case against Awi and accordingly, Awi was acquitted without calling for him to enter his defence. In respect of the appellant, the learned JC held that a *prima facie* case had been made out against him. The learned JC then called upon the appellant to enter his defence. The learned JC, at the conclusion of the trial, convicted the appellant on the charge and sentenced him to the mandatory death penalty and against that conviction he had appealed to this court.

[4] We heard his appeal, wherein at its conclusion we unanimously allowed it and as a result, the conviction was quashed and the sentence set aside. We now give our reasons for so deciding.

[5] The facts of the case are well set out in the judgment of the learned JC (see: appeal record, pp. 158-162). In the light we took of this appeal, it is unnecessary for us to repeat the facts in this judgment.

[6] During the hearing of the appeal before us, what turned out to be the critical important issue is the key question whether the prosecution had adduced credible and reliable evidence proving that the plant materials found in a plastic bag ("exh. P16"), which was in the possession of the appellant at the material time, were 'cannabis' within the meaning of s. 2 of the DDA. Irrefutably, in any drug trafficking case, the evidence of the chemist as an expert witness must be satisfactorily and adequately adduced to prove that the impugned drug is a "dangerous drug" as defined in the DDA. It is apparent that the principal reason for sending to the chemist the drug exhibit for chemical examination and analysis is primarily to determine the identity and the weight of the drug in question, which are basic and necessary ingredients of the offence.

[7] In the ordinary way, the chemist is called as a witness by the prosecution at the trial to prove by the chemist's oral testimony that the subject-matter of the charge is a "dangerous drug" as defined in the DDA; in which case the oral evidence of the chemist constitutes the best evidence (see: *Muhammed Hassan v. PP* [1998] 2 CLJ 170; [1998] 2 MLJ 273). But this was not done in the instant case before us. In the present case the position is this. The chemist who had conducted the chemical examination and analysis on the drugs exhibits had passed away before the commencement of the trial. From the appeal record, a chemist report signed by the chemist was tendered by the prosecution during the trial. The report entitled "LAPORAN DI BAWAH s. 399 KANUN TATACARA JENAYAH", which was marked as exh. P11, can be seen at pp. 209-210 of the appeal record. It is evident to us that exh. P11 was tendered by the prosecution at the trial of the appellant for the purpose of proving that the chemist had examined and analysed the suspected plant materials recovered and found them to be cannabis under s. 2 of the DDA.

[8] In point of law, there is nothing to prevent the prosecution from tendering exh. P11 for the purpose of establishing that the suspected plant materials found in exh. P16 were cannabis under s. 2 of the DDA. There can be no doubt that s. 399(1) of the Criminal Procedure Code ("CPC") renders permissible the admission of exh. P11 as substantive evidence of the contents therein provided that the precondition of service of a copy of the report as laid down in the section had been strictly complied with (see: *Ooi Lean Chai v. PP* [1991] 2 CLJ 1304; [1991] 1 CLJ (Rep) 337; [1991] 2 MLJ 552). In view of the proviso to s. 399(1) of the CPC, which sets out the rule of evidence, all the prosecution had to do was to show that a copy of exh. P11 had been served on the appellant not less than ten clear days before the commencement of the trial. The relevant parts of s. 399 reads:

> 399. (1) Any document purporting to be a report under the hand of any of the persons mentioned in subsection (2) upon any person, matter or thing examined or analyzed by him ... may be given in evidence in any inquiry, trial or other proceeding under this Code unless that person ... shall be required to attend as a witness:
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> (a) by the Court; or
>
> (b) the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:
>
> Provided always that **in any case** in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy of it to the accused not less than ten clear days before the commencement of the trial.
>
> (2) The following are persons to whom the provisions of this section apply:
>
> (a) ...
>
> (b) ...
>
> (c) chemists in the employment of any Government in Malaysia or of the Government of Singapore;
>
> (3) The persons referred to in subsection (2) ... are by this Code bound to state the truth in reports made under their hands. (emphasis added).

[9] We are mindful that in the present case the chemist had passed away and as such the appellant could not give any notice under s. 399(1)(b) of the CPC to require the attendance of the chemist as a witness at the trial. Nonetheless, as an evidentiary

A provision and as an important hearsay exception, the stringent fundamental prerequisite in s. 399(1) of the CPC, namely a copy of exh. P11, must be served on the appellant not less than ten clear days before the commencement of the trial, must be strictly complied with before it could be ruled as admissible and accepted
B as conclusive evidence for the prosecution to prove that the drugs exhibits were cannabis within the meaning of s. 2 of the DDA. The provisions of s. 399(1) of the CPC relates to the admissibility of evidence and is not purely procedural. The proviso to s. 399(1) of the CPC is a condition precedent and, if not complied with,
C exh. P11 cannot be admitted (see: *Chong Yik v. PP* [1953] 1 LNS 15; [1953] MLJ 72). It therefore follows that if exh. P11 was wrongly admitted in evidence, that wrongful admission was an illegality which could not be cured under s. 422 of the CPC (see: *Wong Kok Keong v. Regina* [1954] 1 LNS 125; [1955] MLJ 13).

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[10] Before us, it was common ground, as fairly admitted by the learned DPP, that the condition precedent had not been complied with in the present case. That being the case, exh. P11 was wrongly admitted by the learned JC in contravention of s. 399(1)
E of the CPC and the report in such circumstances was inadmissible despite its admission, even with consent or by waiver of the appellant (see: *Chah Siew Kok v. PP* [1987] 1 CLJ 386; [1987] CLJ (Rep) 518).

F **[11]** This brings us to the submissions of the learned DPP that by virtue of the provisions of s. 32(1)(i) and (j) of the Evidence Act 1950 ("Evidence Act"), exh. P11 could be admitted as substantive evidence to prove that the drugs exhibits were cannabis within the meaning of s. 2 of the DDA at the trial of
G the appellant. The relevant parts of s. 32(1) reads:

> Statements, written or verbal, of relevant facts made by a person who is dead … are themselves relevant facts in the following cases:
>
> H (i) when the statement was made in the course of, or for the purposes of, an investigation or inquiry into an offence under or by virtue of any written law; and
>
> (j) where the statement was made by a public officer in the discharge of his duties.

I **[12]** We could not accept the learned DPP's submissions on this point. It is relevant to note that s. 3 of the CPC lays down the general rule that all offences under the Penal Code and offences

in statutes other than the Penal Code shall be tried according to the provisions of the CPC (see: *Mallal's Criminal Procedure* 6th edn., para. 53). That, broadly speaking, is the basic principle. In our view, even though the CPC relates to criminal procedure, chapter XXXIX of the CPC consisting ss. 395-402A contain special provisions relating to evidence, designed to further the ends of justice and to ensure that an accused person gets a fair trial. On the issue presently under discussion, s. 399 as we have discussed earlier is a special and exclusive provision in the CPC governing the admissibility of reports as evidence of certain persons. On the other hand, s. 32 of the Evidence Act is a general provision which deals with statements of persons who cannot be called as witnesses, on the ground that: (a) they are dead; (b) they cannot be found; (c) they have become incapable of giving evidence; (d) their attendance cannot be procured without an amount of delay or expense which under the circumstances of the case, appears to the court unreasonable (see: *Janab's Key to Criminal Procedure and Evidence* 2nd edn. at pp. 798-799). It is well-settled that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law *generalibus specialia derogant* (see: *Chu Beow Hin v. PP* [1980] 1 LNS 107; [1982] 1 MLJ 135 and *PP v. Chew Siew Luan* [1982] CLJ 354; [1982] CLJ (Rep) 285; [1982] 2 MLJ 119). It is a general rule of evidence that the Evidence Act cannot override specific provisions of other statutes (see: *Koh Hor Khoon v. Regina* [1955] 1 LNS 44; [1955] MLJ 196). Therefore, in our view, the admissibility of the chemist report (exh. P11) must be governed by s. 399(1) of the CPC, not according to s. 32 of the Evidence Act, and that the general provisions of s. 32 of the Evidence Act must necessarily yield to the specific provisions of s. 399(1) of the CPC.

[13] The upshot of all this is that with the exclusion of exh. P11, we found there was no sufficient evidence to justify the conviction of the appellant on the charge. This is based upon the well-established principle that if there is a doubt as to the necessary ingredient of the offence, the benefit of the doubt must go to the accused. For all these reasons, we had therefore allowed this appeal. Accordingly, we quashed and set aside the conviction and sentence against the appellant. The appellant was acquitted and discharged.